

product, namely 'Liberty Brand' that is being asked for.

As to the specific instance of mistake I would first refer to the evidence of the two English speaking witnesses, one of whom was a professional man. However in view of the difference that I have described I can but attribute the errors made by them to sheer and rudimentary inattention; and for this I do not think that the defendants can be held responsible. Thus in the case of *Norman Kark Publications Ltd. v. Odhams Press Ltd.*,⁽⁴⁾ an action to prevent a 'passing off' of a magazine title, Wilberforce J. said when dealing with the principle here involved "As a subsidiary point it is enough to show that a substantial number of persons likely to become purchasers of the goods are liable to be deceived by the defendant's use of the name. On the one hand it is not necessary to show that all, or substantially all, persons in the market associate the name with the plaintiff's goods, if this can be shown of a substantial proportion of persons who are probably purchasers of the goods of the kind in question. On the other hand, that careless or indifferent persons may be led into error is not enough".

And here I would but add that even if it were proved that an unscrupulous retailer had deliberately so placed his goods that he might take advantage of such carelessness or indifference then I do not think that the manufacturer, could be held liable for that.

As to the other instances; Mr. Ong Ah Ann made an error of selection which has little meaning in this case. Whilst the instance of the lady who asked for 'Susu Junjong' and was, or was about to be, given 'Liberty Brand' milk is as much proof of a fraud by the retailer as anything else; and for that fraud again the manufacturers cannot be held liable, *per* Lord Macnaughton in *Payton & Co. Ltd. v. Snelling, Lampard & Co. Ltd.*⁽⁵⁾ Then as to the 'public competition', that is if anything strong evidence that the labels in question do not mislead as otherwise, as was argued by Mr. Potts, why was there no evidence of other such instances. Indeed to my mind that would have been the best type of evidence that the plaintiffs could have produced.

Finally I would but add that even if I am wrong on the above mentioned finding then, in the absence of fraud, I would not after all these years, when the plaintiffs must in all certainty have known what was going on, have been prepared to grant the remedy asked for. Indeed, if there was in truth any danger of confusion the long delay in commencing this action is, in any event, quite incomprehensible to me.

For the reasons given above I enter judgment for the defendants.

Judgment for the defendants.

A TAN CHYE CHOO & ORS. v. CHEW KEW MOI

[O.C.J. (Azmi J.) June 16, 1965]

[Johore Bahru — Civil Suits Nos. 178, 179 & 180 of 1965]

Road traffic — Negligence — Breach of statutory duty — Mechanical defect in car not apparent to ordinary person — Motor Vehicles (Construction and Use) Rules, 1959.

B These actions based on negligence and breach of statutory duty arose from a collision which took place between a motor-car and a taxi-cab belonging to the defendant as a result of which two passengers in the motor car were killed. It appeared that the taxi-cab went to the wrong side of the road, because of a mechanical defect caused as a result of incompetent workmanship carried out in changing the petrol engine to a heavy diesel engine and the subsequent modification of the front suspension thereby making it unsafe on the road and a danger to the public under rules 93 and 94 of the Motor Vehicles (Construction and Use) Rules, 1959. The defendant denied both negligence and breach of statutory duty and in the alternative averred that the defendant will, if the latter is upheld, object that the claim on that ground disclosed no cause of action against her.

C Held: (1) the fact that the taxi-cab went to the wrong side of the road and ran into the car was sufficient *prima facie* evidence that the driver of the taxi-cab was negligent and it was therefore for the defendant to show or explain that what happened was not due to her driver's negligence. On the facts the defendant was not negligent merely because she used the taxi-cab which had a mechanical defect which was not apparent to the ordinary person. Besides she had permission of the registrar and inspector of motor vehicles to use it and the taxi-cab was inspected by the department who stated it was in a satisfactory condition. The defendant had done all that she could be expected to do and therefore the allegations of negligence must fail;

F (2) the Motor Vehicles (Construction and Use) Rules, 1959, were not intended to impose an absolute obligation on the owners of vehicles to have them road-worthy in all events even in the absence of negligence and therefore the plaintiffs' claim for breach of statutory duty must fail.

Cases referred to:—

- G (1) *Phillips v. Britannia Hygienic Laundry Co. Ltd.* [1923] 2 K.B. 832 at p. 841.
(2) *Monk v. Warbey & Ors.* [1935] 1 K.B. 75.
(3) *London Passenger Transport Board v. Upson & Anor.* [1949] A.C. 155.
(4) *Tan Siew Ting & Ors. v. Chong See Jin* (1956), 2 M.C. 247.

H CIVIL SUITS.

D. Murphy for the plaintiffs.

K.E. Hilborne for the defendants.

Cur. Adv. Vult.

Azmi J.: I agreed with counsel that these three suits be consolidated and heard together.

I It is not disputed that as a result of a collision between motor-car BG1358 and taxi-cab H 814 on 28th January, 1962, at the 8th milestone Johore Bahru/Scudai Road, three passengers in the motor car, namely George Tan Eng Leong, John Sim Heng Teong, and Peter Lim Heng Loong received injuries and that George Tan

and John Sim died as a result of their injuries.

It is also conceded by Mr. Murphy for the plaintiffs that the taxi-cab went to its wrong side of the road due to a mechanical defect in the taxi. The plaintiffs did not call any evidence as to how it happened since Mr. Peter Lim, who alone survived the accident, said that he was asleep when it occurred.

These suits are based on negligence and also on breach of statutory duty.

There are several particulars of negligence and, in view of the evidence and arguments, I need I think refer only to the following:

Particular (c) — Driving onto the wrong part of the road.

Particular (d) — Driving into the motor vehicle in which the two deceased persons and Peter Lim were travelling.

Particular (f) — Using or permitting or causing to be used on a road the taxi-cab, the condition of which was likely to cause a danger to persons on the vehicle or on the road.

Particular (g) — Using or permitting to be used the taxi-cab in a condition which was known or ought to have been known by the defendant, her servants or agents to be a danger or likely to cause danger to persons on the vehicle or on the road.

The particulars of the breach of statutory duty read as follows:

"(a) Using or permitting to be used motor vehicle No. H 814 on the road when its type or construction was so unsuitable as to cause or be likely to cause danger to any person on the vehicle or on the said road contrary to rule 93 of the Motor Vehicles (Construction and Use) Rules, 1959. The said vehicle was permitted to be driven on the road with a heavy diesel engine having been put in place of a petrol engine, the said engine being too heavy for the springs and the chassis of the said motor car. The car was thereby unsafe on the road and a danger to the public.

(b) Permitting or causing to be used on a road a motor vehicle No. H 814 the condition of which and the condition of its parts and accessories were a danger and did cause or were likely to cause damage to persons on the vehicle or on the road contrary to rule 94 of the Motor Vehicles (Construction and Use) Rules 1959. The said vehicle was permitted to be driven on the road with a heavy diesel engine having been put in place of a petrol engine, the said engine being too heavy for the springs and the chassis of the said motor car. The car was thereby unsafe on the road and a danger to the public."

The defendant denied that the collision was caused by the negligence of herself or that of her servants or agents.

It is further denied by the defendant that the collision was caused by the defendant's breach of statutory duty or that of her servants or agents in the using of the said motor taxi as alleged by the plaintiffs, and in the alternative if it is found that there was such a breach of statutory duty as is alleged, the defendant will object that the claim on this ground is bad in law and disclosed no cause of action against her

A on the ground that a breach of the said statutory duty as alleged does not confer a right of action on the person or persons suffering damage as a result of the said breach.

B In my view the fact that the taxi-cab went to the wrong side of the road and ran into the motor car is sufficient *prima facie* evidence that the driver of the taxi-cab was negligent, and it is therefore for the defendant to show or explain that what had happened was not due to her driver's negligence.

C The defendant called Mr. Pope, who examined both motor vehicles and also visited the scene of the accident. A plan exhibit D.5 was subsequently made. Mr. Pope said that a round shim was used to give additional height to the front suspension coil spring. This became necessary when the engine of the car was changed from a petrol engine to a diesel engine which is heavier.

D Before I go further into this matter I think I ought to refer to the history of this car as appeared from the registration book. The car had originally a petrol engine and was first registered on 21st February, 1959. On 15th November, 1960, the engine was converted from petrol to diesel engine. This change was approved by the registrar and inspector of motor vehicles, Johore.

The taxi-cab was inspected by the registrar and inspector of motor vehicles, Johore, on 1st October, 1961.

F On 28th January, 1962, the accident happened, i.e. less than 4 months after its last inspection by the registrar and inspector of motor vehicles and about 14 months (or after travelling about 60,000 miles) after the conversion.

G Yap Sen Hock, D.W.3, the driver of the taxi-cab at the time of the accident, maintained that his taxi-cab never crossed into the wrong side of the road, and that it was the other car that came to his side and hit his taxi-cab. I like to say at this stage that this man is no doubt lying on the point because in my view there is ample evidence from the plan at the instance of Mr. Pope and from his evidence that the taxi-cab must have gone out of control some distance before collision and that it had gone to the other side of the road and hit the motor car.

I Yap Sen Hock also said that he used the taxi-cab in travelling between Johore Bahru and Kulai and sometimes as far as Ayer Hitam and covered a distance of about 200 miles a day. He also said that he used to take the taxi-cab to the garage to have small repairs done and that there was one inspection by the R.I.M.V. and that the taxi-cab was going well and normally.

The defendant, a woman aged 58, of little or perhaps no education, said that she bought the taxi-cab for \$7,000 and she understood it to be a diesel engine. She let Yap Sen Hock drive it and for that Yap would pay her about \$17 to \$20 a day. She cannot remember if there were major repairs done to the taxi-cab, but any small repairs would be seen to by Yap, who would also buy new tyres for the taxi-cab. She did not even know if the taxi-cab had been sent to the registrar of motor vehicles for inspection. It is obvious that this woman had no knowledge of motor vehicles and all she was concerned with was that this was a kind of investment and she, being a widow, considered it a good one.

I will now return to Mr. Pope's evidence. In his considered opinion in order to give additional height to the front suspension coil spring, a round shim was placed in the bottom wishbone. According to him the use of this round shim is forbidden by the manufacturer. What should have been done was to have it replaced with a longer coil spring of the required height or perhaps to have used a flat shim. The use of this round shim had caused the entire stability of the front suspension to be greatly impaired because the front springs were no longer located in the bottom wishbone and were in fact lying loosely upon the single shim that had been incorrectly fixed. The result of this was to cause far greater loads on the top ball joints than they were intended to take, and in consequence the near-side top bolt joint completely failed and this allowed the near-side front stub axle complete with hub and wheel to fall away from its anchorage. When the wheel fell away from its anchorage the flexible fluid pipe of the braking system got severed. With the severing of a brake pipe all braking is completely lost on all wheels. When this happened, the driver would, not only find himself completely out of control through the loss of his steering but also his predicament would be worsened by having no brakes whatsoever. In his opinion the accident was caused as a result of the incompetent workmanship carried out by the workshop who undertook the changing of the engines and the subsequent modification to the front suspension.

He maintained that the ball joint was pulled out of its socket, not due to any pressure. As I understood Mr. Pope, what he meant was that the ball joint came out from its socket as a result of the accident and it did not happen before the collision.

In view of the fact that Mr. Pope had examined all the parts of the car immediately after the accident I preferred his evidence to that given by the witness called by Mr. Murphy in rebuttal. In other words, I come to the conclusion that the accident was due to the failure of the front and the near-side top ball joint

A which allowed the near side front stub axle complete with hub and wheel to fall from its anchorage, and that this was due to the incorrect use of the shim for the purpose of giving additional height to that of the coil spring.

B The first question I have to consider is whether the defendant has been negligent in permitting her taxi to be used in that condition, or that she knew that it was in a dangerous condition or ought to have known it.

C Before I go further I think I ought to mention that Mr. Murphy suggested that the defence should have called an officer of the R.I.M.V. to give evidence that the taxi was examined by that department on the 1st October, 1961. This fact was proved by both the driver and also a document, marked exhibit E, which is a report on the examination of the taxi-cab H 814 by the R.I.M.V. It said that it was examined on 1st October, 1961 at the office of the R.I.M.V., Johore, and that its condition was satisfactory. I personally see no reason why I should not accept that statement. I understood that the periodical examination of taxi-cab is carried out by the department in exercise of its powers under the law and as required by the law.

E In my view although the use of the coil shim had proved disastrous in this case, it must be said on behalf of the defendant that it did not happen until 14 months later and after the taxi-cab had travelled about 60,000 miles. In my opinion, therefore, I do not consider that the defendant was negligent merely because she used the taxi-cab which had a mechanical defect which was not apparent to the ordinary person. Besides, she had the permission of the R.I.M.V. to use it, and the same was inspected by the department who stated that it was in a satisfactory condition. In my opinion the defendant had done all that she could be expected to do and therefore the allegation of negligence set out in particulars (f) and (g) must fail.

I would, therefore, now have to consider the law as to the defendant's liability on the question of alleged breach of statutory duty.

H The following opinion of Atkin L.J. in *Phillips v. Britannia Hygienic Laundry Company Ltd.*⁽¹⁾ is now regarded as a sound doctrine:

I "One question to be considered is, Does the Act contain reference to a remedy for breach of it? *Prima facie* if it does that is the only remedy. But that is not conclusive. The intention as disclosed by its scope and wording must still be regarded, and it may still be that, though the statute creates the duty and provides a penalty, the duty is nevertheless owed to individuals."

I also would like to quote the following passage from the judgment of the same learned Lord Justice at p. 842:

"Therefore the question is whether these regulations, viewed in the circumstances in which they were made and to which they relate, were intended to impose a duty

which is a public duty only or whether they were intended, in addition to the public duty, to impose a duty enforceable by an individual aggrieved. I have come to the conclusion that the duty they were intended to impose was not a duty enforceable by individuals injured, but a public duty only, the sole remedy for which is the remedy provided by way of a fine. They impose obligations of various kinds, some are concerned more with the maintenance of the highway than with the safety of passengers; and they are of varying degrees of importance; yet for breach of any regulation a fine not exceeding 10 L. is the penalty. It is not likely that the Legislature, in empowering a department to make regulations for the use and construction of motor cars, permitted the department to impose new duties in favour of individuals and new causes of action for breach of them in addition to the obligations already well provided for and regulated by the common law of those who bring vehicles upon highways. In particular it is not likely that the legislature intended by these means to impose on the owners of vehicles an absolute obligation to have them roadworthy in all events even in the absence of negligence."

In reference to this English case Mr. Murphy, as I understood him, suggested that our Road Traffic Ordinance, 1958, is a wider legislation than the English "Locomotives on Highways Act, 1896", and in support he referred me to the preamble of our Ordinance and in particular to the words in the preamble "provision for the protection of third parties against risks arising out of the use of motor vehicles". In my view, in reference to these words, they were intended merely to refer to the Motor Vehicles (Third Party Risks) Rules, 1959, made under the Ordinance.

At the hearing of this case I was also cited several other cases, for example, *Monk v. Warbey and Others*,⁽²⁾ *London Passenger Transport Board v. Upson and Another*⁽³⁾ and *Tan Siew Ting & Ors. v. Chong See Jin*.⁽⁴⁾ I do not think that it is necessary for me to refer to these cases as I think that for the purpose of this case the judgment of Atkin L.J. (which I have quoted) would be sufficient guidance for me.

Having regard to the provisions of our Motor Vehicles (Construction and Use) Rules, 1959, I do not think that these regulations were intended to impose on the owners of vehicles an absolute obligation to have them roadworthy in all events even in the absence of negligence. I would, therefore, say that the plaintiffs' claims on this question must fail.

I would, therefore, dismiss the suits with costs.

Claims dismissed.

Solicitors: *Murphy & Dunbar; Hilborne & Co.*

A PUBLIC INSURANCE CO. LTD. v. MUTHU

[O.C.J. (Abdul Aziz J.) June 17, 1965]

[K.L. — Civil Suit No. 657 of 1961]

Insurance — Motor insurance — Payment of damages by insurance company to injured party — Repudiation of liability by insurance company after payment of damages — Breach of conditions of insurance policy — Recovery of damages paid — Road Traffic Ordinance, 1958, s. 80(1).

The plaintiffs, an insurance company, brought an action to recover damages which had been paid by them to a party injured in a motor accident involving a motor vehicle insured with them. The plaintiffs alleged that they were entitled to repudiate liability on the ground that the insured had failed to comply with the conditions in the insurance policy requiring him (a) to give notice in writing of the occurrence of any accident or loss or damage or in the event of any claim and (b) to give notice in writing if the insured has knowledge of any impending prosecution in respect of any occurrence which may give rise to a claim under the policy.

Held: (1) the insured in this case had given notice in writing to the plaintiffs of the accident but failed to give notice of the impending prosecution;

(2) the insured had not proved that there had been any waiver by conduct on the part of the plaintiffs in respect of the non-disclosure of the impending prosecution and therefore as there had been a breach of the conditions of the insurance policy, the plaintiffs could rightly repudiate liability and recover the amount paid by them.

E CIVIL SUIT.

N. A. Marjoribanks for the plaintiffs.

K. A. Menon for the defendant.

Cur. Adv. Vult.

Abdul Aziz J.: This is probably the first case of its kind in this country where an insurance company having paid out damages to a party injured in a motor accident subsequently repudiated liability on account of a breach of the conditions in the insurance policy, such condition being usually contained in the small prints of the policy.

The plaintiffs' claim is that the insured has failed to comply with certain conditions contained in clause 1 of the conditions of the policy which reads:

"Notice shall be given in writing to the company immediately upon the occurrence of any accident or loss or damage or in the event of any claim. . . . Notice shall also be given in writing to the company immediately the insured shall have knowledge of any impending prosecution in respect of any occurrence which may give rise to a claim under this policy. . . ."

Under the compendious 'condition precedent' clause the due observance and fulfilment of the terms and conditions of a policy is a condition precedent to liability on the part of the company, and the position is not affected by the fact that damages have already been paid to the injured party under the policy. The right to recover is inherent in the terms.

It was alleged (a) that the defendant failed to notify the plaintiffs that one Haji Mohamed